

**IN THE HIGH COURT OF NEW ZEALAND
IN ADMIRALTY
AUCKLAND**

CIV-2010-404-2435

UNDER ADMIRALTY ACTION IN REM

BETWEEN GENERAL MARINE SERVICES
LIMITED
Plaintiff

AND THE SHIP "LUANA"
Defendant

Hearing: 15 June 2010

Appearances: C T Patterson for the Plaintiff
G Blanchard and J Nolen for Yachts West Pty Limited

Judgment: 16 June 2010

Further Judgment
and Reasons: 7 February 2011

JUDGMENT (NO. 2) OF WOODHOUSE J

*This judgment was delivered by me on 7 February 2011 at 3:30 p.m.
pursuant to r 11.5 of the High Court Rules 1985.*

Registrar/Deputy Registrar

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Counsel:
Mr C T Patterson, Barrister, Auckland
Mr G Blanchard, Barrister, Auckland
Solicitors:
Mr K Young, Jones Young, Solicitors, Auckland
Mr J Nolen, Lowndes Associates, Solicitors, Auckland

[1] Yachts West Pty Limited (Yachts West) is the owner of the Luana, a motor boat. Yachts West applied to set aside a caveat obtained by the plaintiff. The caveat prevented the Luana from being released from an arrest obtained by a third party; an interim arrangement between Yachts West and the third party required that Luana be released from the arrest. Yachts West also applied for orders striking out the plaintiff's claims against the Luana, summary judgment against the plaintiff dismissing its claims, damages and indemnity costs.

[2] By judgment dated 16 June 2010 the caveat was set aside with the reasons to follow. These are the reasons, together with my decision on the other applications.

Background

[3] In accordance with the principle applying on applications to strike out, disputed allegations of fact of the plaintiff which are not demonstrably without foundation are assumed for present purposes to be capable of being proved.

[4] The Luana was built for Yachts West by Boat 90 Holdings Limited (In Liquidation) (Boat 90). Boat 90 is a wholly owned subsidiary of Salthouse Marine Limited (In Receivership) (Salthouse Marine).

[5] Christopher Norman is a director and shareholder of Yachts West. Mr Norman was a non-executive director of Salthouse Marine between 23 December 2008 and 3 February 2010. Mr Norman is also associated with a trust which, indirectly, is owner of 50% of the shares in Salthouse Marine.

[6] The plaintiff alleges that Mr Norman at material times was also a de facto director of Boat 90. The sole director formally appointed to Boat 90 was Julie Salthouse. Ms Salthouse was also a director of Salthouse Marine and associated with a trust which owns 50% of the shares in Salthouse Marine.

[7] On 18 June 2009 Yachts West entered into a written agreement with Boat 90 for construction of the Luana. The purchase price under the agreement was

\$3,220,201 (excluding GST). This did not include the engines, worth approximately \$600,000, and other equipment, which Yachts West supplied independently. Between 1 October 2008 and 3 December 2009 Yachts West made payments totalling \$3,505,375 to Boat 90 for the purchase of the Luana.

[8] Clause 9.1 of the agreement for purchase of the Luana provides that the boat, and all materials from time to time intended for its construction, were the property of Yachts West, but Boat 90 had a lien on the ship for any unpaid purchase monies.

[9] On 4 February 2010 a receiver was appointed to Salthouse Marine by a trustee company associated with Mr Norman. On 11 March 2010, the receiver of Salthouse Marine agreed that Yachts West could take possession of the Luana pursuant to the purchase agreement. There is an affidavit from the receiver detailing the independent enquiries he undertook before agreeing to allow Yachts West to take possession. Construction of the Luana had not been completed at that date and Salthouse Marine had guaranteed the performance of Boat 90. However, it was apparent, and I accept, that Boat 90 and Salthouse Marine were not in a position to complete construction. Mr Norman, on behalf of Yachts West, signed a completion certificate and took possession.

[10] On 19 March 2010 a warrant of arrest for the Luana was served. The warrant was issued on the application of Boat 93 Limited and the trustees of the Jim Delegat Business Trust. Boat 93 was another subsidiary of Salthouse Marine. It was incorporated to build a boat for the Delegat trustees. Boat 93 and the Delegat trustees alleged that \$284,500 had fraudulently been transferred from Boat 93 to Boat 90 and used in the construction of the Luana. The allegation is denied by Yachts West and Mr Norman, but it is unnecessary to go into the detail.

[11] On 31 March 2010 an interim agreement was reached between Boat 93, the Delegat trustees and Yachts West. Yachts West agreed to pay \$350,000 into a trust account as security for the claims of Boat 93 and the Delegat trustees. This was in consideration of the agreement of Boat 93 and the Delegat trustees immediately on payment to release the Luana from the arrest.

[12] The agreed sum of \$350,000 was paid into a trust account on 1 April 2010. It is relevant to some of the applications of Yachts West, and in particular the application for indemnity costs, to record the sequence of events on that day. The solicitors for Yachts West are Lowndes Associates. The solicitors for Boat 93 and the Deleгат trustees are Jones Young. Jones Young are also the solicitors for General Marine Services, the plaintiff in this proceeding. Counsel for Boat 93, the Deleгат trustees and General Marine Services, is Mr Patterson:

- (a) At 9:57 am Lowndes Associates advised Jones Young that Lowndes Associates was holding \$350,000 in cleared funds in trust in accordance with the interim arrangement. Jones Young was asked to attend immediately to release of the Luana from the arrest as agreed.
- (b) At 12:10 pm Lowndes Associates sent a further e-mail to Jones Young requesting the release. This was copied at the same time to Mr Patterson together with a draft release of arrest document.
- (c) At 12:16 pm Jones Young advised Lowndes Associates that Mr Patterson was attending to the release.
- (d) At approximately 2:30 pm Mr Patterson advised the High Court Registrar that he, Mr Patterson, had the release of arrest which would be filed ~~at~~ his earliest opportunity but before the Registry closed”.
- (e) At some point, with the time unclear but apparently on that day, Jones Young, or Mr Patterson directly, received instructions from or on behalf of General Marine Services to file a caveat against release. The caveat was filed at 4:15 pm.
- (f) At 4:55 pm the release from arrest was filed.

[13] On 6 April 2010 Lowndes Associates wrote to Jones Young stating that Yachts West believed that the actions of General Marine Services, Mr Patterson and Jones Young were inappropriate and that they considered that General Marine

Services would be liable for damages and costs for not having sufficient reason for entering a caveat.

[14] Jones Young replied on 7 April 2010. Some of the detail of the sequence of events on 1 April 2010, recorded above, was provided. In addition, as to the substance of the claim by General Marine Services, Jones Young advised that, pursuant to an agreement between General Marine Services and Boat 90, General Marine Services had ~~a~~ security interest in all of Boat 90's present and after acquired property that [General Marine Services] has performed services on or to or in which goods or materials supplied or financed by [General Marine Services] have been attached or incorporated". The security was not registered, or sought to be registered, until some time after 4 February 2010 at which date Yachts West was the owner of the Luana. The plaintiff claimed that it was owed \$2,189.46 by Boat 90 for supply of fittings in November and December 2009 to Boat 90 which were used in the construction of the Luana.

The statement of claim

[15] At the hearing the plaintiff lodged a draft amended statement of claim and sought leave to file it. I will consider the issues by reference to this amended statement of claim, and allowing for any amendment that might properly be made.

[16] The plaintiff advanced three causes of action pursuant to which it claimed to be entitled to maintain the caveat and to be entitled a proprietary remedy against the Luana in respect of the unpaid purchase price for the fittings owed by Boat 93. It is convenient to consider each cause of action in conjunction with the application by Yachts West to strike out each of those causes of action.

The first cause of action

[17] The claim in essence is that, by fraud, Mr Norman and Yachts West got General Marine Services to supply fittings. It is alleged that when this occurred there was no intention of getting Boat 90 to pay and that Mr Norman and Yachts

West knew that Boat 90 would not pay. The allegedly fraudulent acts are (1) breaches of the duties of directors in ss 135 and 136 of the Companies Act 1993 by Mr Norman, as a de facto director of Boat 90 and (2) getting Boat 90, through the receiver of Salthouse Marine, to release possession of the Luana, and (3) getting the receiver to pass title.

[18] In reliance on these allegations against Mr Norman and Yachts West, the plaintiff contends that it is entitled to ~~an~~ institutional constructive trust over the Luana to the extent of its \$2,189.46 plus interest and costs”.

[19] In my judgment this claim cannot succeed for a number of reasons. In this respect I am in general agreement with the submissions of Mr Blanchard for Yachts West. General Marine Services is entitled to make an application to the Court pursuant to s 301 of the Companies Act 1993 for Mr Norman’s alleged breaches of duty under ss 135 and 136 of the Companies Act 1993. But that would have to be an application against Mr Norman, not against the Luana. And it would in any event not entitle General Marine Services to relief. The only relief available under s 301 for the alleged breaches of duty as a director would be compensation payable to Boat 90. Section 301(1)(c) does make provision for payment by the defaulting person directly to the applicant creditor, but that provision does not apply in respect of a director’s breaches of statutory duty.¹ The alleged breaches of statutory duty by Mr Norman would not give rise to the proprietary relief sought by the plaintiff against the Luana, whether by way of an institutional constructive trust, as pleaded, or the more elusive remedial constructive trust.

[20] If these difficulties are put to one side, a further and fundamental obstacle remains to a claim to a constructive trust in favour of the plaintiff ~~over~~ the Luana” as pleaded. If the plaintiff was fraudulently induced to supply the fittings to Boat 90 and these fittings were used in the construction of the Luana, the conventional proprietary claim would be to recover the fittings. No principled basis was advanced by Mr Patterson for converting a proprietary claim to some fittings into a general proprietary claim to an undefined share of the entire boat. This is given emphasis by the fact that a claim to recover the fittings could be coupled with a claim for

¹ *Mitchell v Hesketh* (1998) 8 NZCLC 261,559.

damages, or equitable compensation, against Mr Norman and Yachts West, as the parties allegedly responsible. This would be to cover the possibility that the fittings could not be recovered or, if recoverable, to cover the possibility of diminution in value.

[21] There is the separate allegation that in March 2010 the receiver of Salthouse Marine transferred title and possession to Yachts West, through Mr Norman. The third cause of action also relies on these allegations relating to transfer of possession and title. Generally for reasons outlined when considering the third cause of action, these allegations in support of the first cause of action cannot give rise to the proprietary relief sought against the Luana in the first cause of action.

The second cause of action

[22] The second cause of action is pleaded, in its essence, as follows:

30 Because both Yachts West and/or Boat 90 knew that the marine fittings supplied by the plaintiff would be used to construct the Luana, and that Boat 90 was unable to pay for those marine fittings, there was no consideration provided for the provision of the marine fittings by the plaintiff. The plaintiff consequently has a right of part ownership in the Luana by way of an institutional constructive trust.

[23] Mr Patterson submitted that the legal foundation for this claim, as a claim distinct from the first cause of action, is to be found in *The Venture*.² In that case the *Venture*, a yacht, was registered in the name of Andrew Stone. The yacht had been purchased for £1,050. £550 was provided by Percy Stone. The Court of Appeal held that the provision of the money by Percy Stone gave rise to a resulting trust in his favour whereby Andrew Stone held a share in the yacht in trust for Percy Stone, that share being the fraction of the money contributed in relation to the purchase price – fifty-five 105ths.

[24] *The Venture* has no application on the facts alleged by the plaintiff in this case, and allowing for all amendments to the claim that might be made. A plaintiff who succeeds in establishing a resulting trust does so because of a presumption: this

² [1908] P 218 (CA).

is that, where a person pays for property which goes into, or remains in, the name of another person, it is presumed, in the absence of evidence of a contrary intention, that the payee intended to acquire beneficial ownership of the property.³

[25] A presumption in favour of the plaintiff cannot arise in this case to produce a trust in favour of the plaintiff. The relationship between the plaintiff and Boat 90 was that of vendor and purchaser of goods. The plaintiff expected to be paid for the goods. Even if the plaintiff can establish that there was no consideration as a matter of fact – which is doubtful to say the least, because there was a promise and an obligation to pay – that cannot alter the clear nature of the relationship of vendor and purchaser and the plain expectation of the plaintiff that it would be paid.

[26] Mr Patterson contended that *The Venture* gave rise to a special rule relating to admiralty cases. It seems that this was based on the fact that in *The Venture* the action was commenced as an admiralty action of possession. But the Court did not make a special rule for admiralty actions. The opposite occurred; the general principles relating to resulting trusts were held to apply in admiralty actions as in other proceedings. As the Court expressly stated, the facts of the case, arising in the admiralty proceeding, gave rise to a straightforward application of the clear principles long established in *Dyer v Dyer*.⁴

The third cause of action

[27] The third cause of action has two limbs. The first is founded on subpart 6 of Part 6 the Property Law Act 2007 – “Setting aside of dispositions that prejudice creditors”. The plaintiff contends that the transfer of title to and possession of the Luana to Yachts West in March 2010 prejudiced the plaintiff as a creditor of Boat 90 and that, having regard to the circumstances relating to the transfers, title and possession of the Luana should be transferred back to Boat 90.

[28] The second limb of this cause of action was added in the draft amended statement of claim. It is as follows:

³ See Butler et al *Equity and Trusts in New Zealand* (2nd ed) at 12.3.1(1), p 314.

⁴ (1788) 2 Cox Eq Cas 92; 30 ER 42 (at 93;43). See *The Venture* at [229]-[230].

- 35 The plaintiff has a security interest in the Luana, in the amount of \$2,189.46, arising under clause 8.1 of its terms of trade as contractually agreed to by Boat 90 on or about 19 January 2009.
- 36 If the Luana is revested in Boat 90, the plaintiff will then be entitled to enforce its security interest in the Luana.

[29] I am satisfied that this claim cannot succeed.

[30] The plaintiff challenges the actions of Mr Norman and Yachts West, together with those of the receiver of Salthouse Marine, in March 2010. Possession was transferred on that date, but Yachts West always had title. Contrary to the plaintiff's allegation, it is clear beyond reasonable argument that title to the Luana was not transferred pursuant to some sort of improper action in March 2010, but was held by Yachts West from the commencement of the contract between Yachts West and Boat 90 for construction and sale of the Luana in June 2009.

[31] The transfer of possession could amount to a disposition as defined in s 345(2) of the Property Law Act. This is because it had the effect of releasing the lien in favour of Boat 90: see s 345(2)(d). But this disposition would also have to come within s 346(1). Section 346(1) provides:

This subpart applies only to dispositions of property made after 31 December 2007—

- (a) by a debtor to whom subsection (2) applies; and
- (b) with intent to prejudice a creditor, or by way of gift, or without receiving reasonably equivalent value in exchange.

[32] The debtor was and is Boat 90. The transfer of possession was authorised by the receiver of Salthouse Marine. Although, technically the disposition may have been by Boat 90 in terms of s 346(1)(a), it cannot be said that the debtor had the intent required by s 346(1)(b) – the intent was that of the receiver: see *Brown v Bennett*.⁵ The alternative requirements of s 346(1)(b) do not apply.

[33] The conclusion to this point is sufficient to strike out the third cause of action. However, if it is assumed that there was a disposition to which subpart 6 of Part 6 of the Property Law Act applied, that would not give the plaintiff a proprietary

⁵ [1999] 1 BCLC 649 (EWCA).

interest in the Luana. Any relief granted pursuant to subpart 6 is for the benefit of creditors as a body and would not give the plaintiff a right to enforce a security it failed to perfect by registration before title passed to Yachts West. This is the effect of s 344 of the Property Law Act, which is as follows:

The purpose of this subpart is to enable a court to order that property acquired or received under or through certain prejudicial dispositions made by a debtor (or its value) be restored for the benefit of creditors (but without the order having effect so as to increase the value of securities held by creditors over the debtor's property).

The words in brackets expressly exclude the second limb of the plaintiff's claim.⁶

Conclusion on applications to strike out and for summary judgment

[34] Having concluded that each of the three cause of action is not sustainable and should be struck out I am satisfied that there should be summary judgment for the defendant dismissing the plaintiff's proceeding.

Caveat

[35] The discussion to this point provides reasons for setting aside the caveat. There are further reasons. Mr Patterson accepted that, in determining whether to sustain the caveat, the Court is exercising a discretion. In the exercise of that discretion I would not have sustained the caveat for the following reasons, quite apart from the lack of merit in the claims: (1) In relative terms, the claims are complicated claims in the Admiralty jurisdiction of the High Court for a very small sum of money. (2) The amount claimed would be dwarfed by legal costs. (3) A proprietary claim would be a secondary claim against the Luana, at best, because the primary defendants, on the plaintiff's allegations, are Mr Norman and Yachts West. (4) It appears that the plaintiff might be unable to meet any substantial award against it. This was confirmed by a memorandum from Mr Patterson filed after the hearing at my request. (5) There was no suggestion that Mr Norman or Yachts West could

⁶ See also Personal Property Securities Act 1999, s 52: –A buyer or lessee of collateral who acquires the collateral for value takes the collateral free of an unperfected security interest in the collateral, unless the unperfected security interest was created or provided for by a transaction to which the buyer or lessee is a party.”

not meet a judgment in favour of the plaintiff for the small sum claimed, together with interest and costs. The significant security provided on the claim by Boat 93 and the Delegat trustees indicates the opposite. (6) I consider that the lodging of the caveat, and the subsequent commencement of this proceeding, were abuses of process. The reasons for that conclusion are discussed under the following heading.

Costs

[36] Yachts West seeks indemnity costs; that is to say, the actual costs and disbursements, and any witness expenses, reasonably incurred by Yachts West in bringing its application on which it has succeeded. Under the High Court Rules indemnity costs may be awarded if one or more of the provisions of r 14.6(4) apply. The only provision that would apply, and the provision relied on by Yachts West, is that indemnity costs may be awarded if the other party ~~has~~ acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding⁷. This provision was considered in some detail by the Court of Appeal in *Bradbury v Westpac Banking Corporation*.⁷

[37] I am satisfied that there are grounds for an award of indemnity costs pursuant to r 14.6(4)(a) and that the discretion to award indemnity costs on these grounds being established should be exercised in favour of Yachts West.

[38] My reasons for this conclusion are in large measure set out in the discussion to this point. The claims to a proprietary interest in the Luana were untenable claims. I am satisfied that they were contrived in an endeavour to justify a caveat which should never have been filed. There are the further considerations summarised at [35] above, being the further reasons for concluding that the caveat should be discharged. And I am satisfied that the lodging of the caveat, with this proceeding that followed, was also an abuse of process. This is because it was a contrived claim without merit, it was devised to nullify the consequences of the arrangements made in the separate proceeding between Yachts West and Boat 93 and the Delegat trustees and it was implemented by the same solicitors and counsel who

⁷ [2009] 3 NZLR 400.

had an obligation immediately to file the release from arrest. I am satisfied that inferences to this effect can properly be drawn from the facts, including the sequence of events summarised at [11]-[12] above.

[39] I am satisfied, for these reasons, that Yachts West is entitled to indemnity costs against the plaintiff. However, the plaintiff may consider that it is entitled to be indemnified in that regard by other parties. I have not reached any conclusion as to the liability of other parties and cannot do so without those other parties being heard. Subject to those important reservations, I am bound to observe that there are questions relating to the conduct of the solicitors and counsel of the plaintiff. This is a matter that I expressly raised at the hearing and which I have just touched on. There is also some evidence from Yachts West indicating the possibility of arrangements having been made between the Delegat trustees and a number of the creditors of Boat 90. Having regard to these matters I will make the order for indemnity costs subject to a condition giving General Marine Services an opportunity to seek independent advice.

Damages

[40] High Court r 25.46(4) provides:

A party who delays the release of property by entry of a caveat is liable in damages to any person having an interest in the property, unless that party shows to the satisfaction of the court good and sufficient reason for having the caveat entered.

[41] Yachts West has applied for an order that the plaintiff pay damages to it pursuant to this rule. The submissions for Yachts West on this point were brief and there was no quantification of alleged losses. It is not clear that this claim was being pursued with any vigour. If it is, and if it cannot be settled, Yachts West should commence a conventional action.

Result

[42] The plaintiff's claims are struck out.

[43] There is judgment for the defendant.

[44] The plaintiff shall pay to Yachts West Pty Ltd the actual costs and disbursements, and any witness expenses, reasonably incurred by Yachts West Pty Ltd in this proceeding provided that this order may not be enforced for a period of three weeks from the date of delivery of this judgment and subject to any further order of the Court.

[45] The application for damages of Yachts West Pty Ltd is dismissed without prejudice in any respect to Yachts West Pty Ltd's commencing and pursuing an action for damages.

Peter Woodhouse J